

IN THE

Supreme Court, U. S.  
FILED

# Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

October Term, 1976

No. 76-234

BOYD JAMES O'DONNELL,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

THOMAS R. SHERIDAN,  
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vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.

Boyd James O'Donnell, your petitioner, respectfully  
prays that a Writ of Certiorari be issued to review  
the judgment of the United States Court of Appeals  
for the Ninth Circuit entered in the above-entitled  
cause on July 20, 1976.

**Opinions Below.**

In accordance with a plea bargain, petitioner pleaded  
guilty to one count of a 31 count indictment in the  
United States District Court for the District of Arizona.  
Petitioner appealed to the United States Court of Ap-  
peals for the Ninth Circuit, and on July 20, 1976,  
a panel of that court affirmed petitioner's conviction.  
The opinion has not yet been officially reported. It  
is reproduced as Appendix A hereto.

**Jurisdiction.**

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 20, 1976. (See Appendix A.)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**Questions Presented.**

**I**

Does a plea of guilty waive Fifth Amendment due process and Sixth Amendment speedy trial violations?

**II**

Did the District Court comply with Rule 11, Federal Rules of Criminal Procedure, in accepting petitioner's plea of guilty?

**Constitutional Provisions and Statutes Involved.**

**Constitution of the United States.**

**Fifth Amendment.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Sixth Amendment.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**Federal Rules of Criminal Procedure.**

**Rule 11. Pleas.**

A defendant may plead not guilty, guilty or, with consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere*, without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.\*

**Statement of the Case.**

Petitioner was initially charged in a two count indictment returned on May 30, 1974. Shortly thereafter,

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\*This is the text of Rule 11 as enacted when petitioner offered his guilty plea on November 18, 1975. However, Rule 11 has been substantially revised, and such revisions were effective on December 1, 1975.

petitioner was properly arraigned and entered pleas of not guilty to both counts. Trial was set to commence on November 26, 1974, approximately six months later. Prior to trial, on November 5, 1974, the government filed a motion to vacate the trial date. Over the strenuous objections of defense counsel, the district court granted this motion but did not set a new trial date.

Thereafter, on January 8, 1975, a superseding indictment was returned, charging the defendant with 31 counts of making a false oath in connection with a bankruptcy proceeding, in violation of 18 U.S.C. §152. The defendant was properly arraigned shortly thereafter, and entered a not guilty plea to all 31 counts. Trial was set to commence on November 18, 1975, almost one year from the date initially set for trial.

On October 30, 1975, petitioner filed a motion to dismiss the superseding indictment upon two related constitutional grounds. First, petitioner was denied a speedy trial, as required by the Sixth Amendment, based upon the government's prejudicial post-indictment delay. Second, due process of law was denied petitioner, in violation of the Fifth Amendment, based upon the government's prejudicial pre-indictment delay. After a hearing on November 7, 1975, the motion was denied by the district court.

On November 18, 1975, in accordance with a plea bargain, petitioner offered a plea of guilty to Count XI of the superseding indictment. The district court accepted the guilty plea. The government then dismissed the remaining counts of the superseding indictment, and all proceedings against petitioner's former wife, Joan O'Donnell.

On December 8, 1975, almost 6 years from the date of the alleged offense, the Honorable Walter E. Craig, United States District Judge, sentenced the defendant to 3 years in the custody of the Attorney General. A stay of execution was granted until December 29, 1975.

On December 16, 1975, a timely notice of appeal was filed with the Clerk of the United States District Court, District of Arizona. Since the filing of the initial indictment, petitioner has remained at liberty on the bond.

On May 13, 1976, this matter was argued before a panel of the Court of Appeals for the Ninth Circuit. On July 20, 1976, an opinion of that panel was filed affirming petitioner's conviction. (See Appendix A.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals for the Ninth Circuit affirming petitioner's conviction.

## REASONS FOR GRANTING THE WRIT.

### I

#### A Plea of Guilty Does Not Waive Fifth Amendment Due Process and Sixth Amendment Speedy Trial Violations.

This Court has never spoken directly to the issue of whether a defendant waives by his guilty plea a violation of the Due Process Clause of the Fifth Amendment based upon unreasonable pre-indictment delay. Similarly, this Court has yet to decide whether a defendant's guilty plea waives his claim under the Sixth Amendment based upon a denial of a speedy trial. However, a recent opinion by this Court does provide some guidance.

In *Menna v New York*, 423 U.S. 61, 96 S.Ct. 241 (November 17, 1975), this Court held that a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment are not waived by a guilty plea.

"Where the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 2103, 40 L.Ed.2d 628 (1974)." 423 U.S. at 62, 96 S.Ct. at 242 (footnote omitted).

The footnote which appeared following the above quote is particularly relevant to the instant case. It reads, in pertinent part, as follows:

"A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt

and which do not stand in the way of conviction if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

"We do not hold that a double jeopardy claim may never be waived. We simply hold that *a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.*" 423 U.S. at 62, 96 S.Ct. at 242, n.2. (Emphasis added.)

Thus, a constitutional violation which would prevent the government from maintaining the prosecution is not waived by a plea of guilty, even if the plea is made voluntarily and knowingly. An application of the above rationale involves the constitutional violation considered in *Menna*, the Double Jeopardy Clause. Once jeopardy has attached, the government, either state or federal, may not prosecute an individual for the same offense.

Similarly, once it is determined that the government is guilty of pre-indictment delay or post-indictment delay, the prosecution must be terminated.

*United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971);  
*Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972).

Thereafter, the government is forever barred from proceeding on that offense.

The situation presented by the instant case is analogous to that presented in *Menna*. If prejudicial pre-

indictment delay or post-indictment delay is found to be present in the instant case, then the government is constitutionally barred from maintaining this prosecution. Thus, under the rationale of *Menna*, petitioner, by pleading guilty, did not waive his right to assert these constitutional violations.

In its opinion the Ninth Circuit held that a guilty plea does waive Fifth Amendment due process and Sixth Amendment speedy trial violations because:

"The Constitution protects the accused from a conviction by trial but *not* a conviction by way of a plea of guilty." (See Appendix A, p. 8.) (Emphasis added.)

The Court of Appeals reasoned that the purpose of these constitutional provisions is "to insure that factual guilt is validly established," and that "[t]he existence of such violations is consistent with guilt as a matter of fact." (*ibid.*)

To allow such an interpretation of these vital constitutional provisions will have serious ramifications, both for future defendants and for the federal courts. The Ninth Circuit's opinion failed to consider that dilatory tactics by the government may have influenced a defendant to plead guilty, as when key defense witnesses have died or otherwise become unavailable. Further, if the government is guilty of pre-indictment or post-indictment delay, it may cure these constitutional violations by simply offering the defendant a plea bargain which he cannot refuse. At that point, the government has placed a price on the defendant's exercise of his constitutional rights. If the defendant accepts the plea bargain, then he waives his right to assert on appeal these constitutional violations which should have terminated the prose-

cution in the first instance. If he refuses the plea bargain then he may raise these issues on appeal, but must first go through a trial where his defense has been prejudiced by the government's dilatory tactics and, consequently, there exists a greater likelihood of conviction. Under such circumstances, cases which could have been disposed by plea will go to trial solely to preserve these constitutional issues on appeal. Such a rule does not promote judicial economy.

In light of this Court's clear holding in *Menna* that it is the government's ability or inability to maintain a prosecution which is the key in determining whether a plea of guilty waives a particular constitutional violation, this erroneous and restrictive holding by the Court of Appeals should be reviewed by this Court. To do otherwise will result in serious constitutional prejudice to future defendants to which the federal courts should not be party.

For the reasons expressed above, petitioner requests that certiorari be granted to decide this constitutional Question.

## II

### **The District Court Failed to Comply With Rule 11, Federal Rules of Criminal Procedure, When It Accepted Petitioner's Guilty Plea.**

In *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), this Court held that a district court must strictly adhere to the provisions of Rule 11, F.R.Cr.P., in accepting a guilty plea. In the absence of such strict adherence, the guilty plea must be vacated. Among the requirements of Rule 11 are that a defendant enter the plea voluntarily and that he understand the nature of the charge

and the consequences of his plea. Also, there must be a factual basis for the guilty plea. The explanations and findings which are required by Rule 11 must be made on the record.

*McCarthy v. United States*, 394 U.S. at 470, 89 S.Ct. at 1173;

*Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971).

At the time that the district court accepted petitioner's guilty plea it failed to comply with Rule 11 in that: (1) no determination was made that petitioner acted with the requisite intent to defraud; (2) no determination was made that the false oath went to material facts; (3) petitioner was not placed under oath when examined by the district court when it attempted to establish a factual basis for the plea and (4) petitioner was not informed of the elements of 18 U.S.C. §152, the offense to which he pleaded guilty.

Instead, the district court merely read the substance of Count XI, the count to which petitioner pleaded guilty, and then asked: "Generally, are those facts true?" Petitioner replied: "Yes." Clearly, this cursory and shallow inquiry does not satisfy the requirements of Rule 11.

In its opinion affirming petitioner's conviction, the Ninth Circuit overlooked many of the district court's errors in accepting the guilty plea. For example, the Court of Appeals makes reference to the fact that petitioner was informed of the maximum possible sentence he (petitioner) could receive, but fails to note that it was the Assistant United States Attorney who informed petitioner of that fact, and not the district court as required by Rule 11. At least one other

Court of Appeals had held that such a departure from the requirements of Rule 11 mandates that the guilty plea be set aside.

In *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976), the Court of Appeals for the Fifth Circuit vacated a defendant's guilty plea based upon the district court's failure to personally address the defendant as to: the range of possible penalties; whether the defendant understood the nature and consequences of this plea; and whether the defendant made his plea freely and voluntarily. Rather than the court, the prosecutor made those inquiries of the defendant. The district court in *Crook* directly questioned the defendant only to establish a factual basis for the plea. At the time that the defendant in *Crook* entered his guilty plea the 1975 Amendments to Rule 11 were not in effect. All other requirements of Rule 11 were apparently met when the guilty plea was accepted. Thus, the Fifth Circuit has held that a guilty plea must be set aside if a district court does not personally address the defendant. This is in direct conflict with the Ninth Circuit's opinion affirming petitioner's conviction.

At the time of accepting petitioner's guilty plea, the district court failed to make any inquiry into petitioner's conduct which supposedly constituted the offense charged. Nor did the district court inquire of the government as what its proof would have been had the matter proceeded to trial. Instead, the district court was satisfied with petitioner's response that the facts as contained in the count to which he (petitioner) was pleading guilty were "generally" true.

Rule 11 is designed to insure that when a defendant enters a guilty plea it is done voluntarily and with a full understanding of the consequences. In order

to insure that these requirements are met, Rule 11 mandates that a district court establish, *on the record*, that a defendant is entering his plea voluntarily, with a full understanding of the consequences, and that there is a basis in fact for the plea. This type of inquiry necessarily requires a district court to conduct a thorough probe of the facts surrounding each plea. In the instant action, the district court failed to fulfill its obligation under Rule 11.

Finally, a recent decision of the Court of Appeals for the First Circuit indicates that there, too, the district court must strictly adhere to the requirements of Rule 11 in accepting guilty pleas. In *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975), the First Circuit vacated a guilty plea based upon the district court's failure to advise the defendant of the existence of a special parole provision. The special parole provision was found to be included within the requirement of Rule 11 that the defendant understand the consequences of his plea.

Based upon this Court's holding in *McCarthy* that the requirements of Rule 11 be strictly followed and the conflicting decisions among the various Courts of Appeals, petitioner respectfully urges that certiorari be granted as to this Question.

**Conclusion.**

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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# APPENDIX

## APPENDIX A.

### Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Appellee*, vs. Boyd James O'Donnell, *Appellant*. No. 76-1003.

### OPINION

[July 20, 1976]

Appeal from the United States District Court for the District of Arizona.

Before: WALLACE and SNEED, Circuit Judges, and FERGUSON,\* District Judge.

SNEED, Circuit Judge:

Appellant O'Donnell appeals the district court's judgment which convicted him upon his plea of guilty of violating Title 18, U.S.C. § 152<sup>1</sup> (knowingly and fraudulently making a false oath in relation to material matters in a bankruptcy proceeding) as charged in Count XI of the indictment. Our jurisdiction rests on 28 U.S.C. § 1291.

In this appeal O'Donnell contends: (1) his plea of guilty did not conform with Rule 11 of the Federal Rules of Criminal Procedure; (2) he was denied his constitutional rights to due process of law and to a speedy trial; (3) these constitutional rights are not

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\*Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

<sup>1</sup>18 U.S.C. § 152 provides in pertinent part:

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

waived by a plea of guilty; (4) Count XI failed to state an offense.

Appellant therefore urges that we should set aside the guilty plea, vacate the judgment, and remand the case to the district court with directions that appellant be permitted to plead anew. We reject appellant's contentions, and affirm the judgment of the district court.

I.

*Facts.*

On May 30, 1974, Boyd James O'Donnell was charged in a two-count indictment for his acts of March 13, 1970, which allegedly violated 18 U.S.C. § 152 and for his acts of April 7, 1970, which allegedly violated 18 U.S.C. § 1621 (perjury). Trial was set for November 26, 1974, but the date was vacated on November 5, 1974.

On January 9, 1975, the grand jury filed a thirty-one count superseding indictment, charging the appellant with thirty-one violations of 18 U.S.C. § 152 arising from acts occurring on either March 13, 1970, or April 7, 1970. Count XI of this indictment charged the appellant with knowingly and fraudulently making a false oath as to material matters relating to his bankruptcy consisting of his knowing and fraudulent statement in his petition for bankruptcy that he was employed by United International Corporation of Phoenix, Arizona, whereas in truth and in fact, appellant then knew he was not employed by United. Trial was set for November 18, 1975.

On October 30, 1975, appellant filed a motion to dismiss the indictment on the grounds that the pre-indictment and post-indictment delays had deprived the

appellant of his rights to due process of law and to a speedy trial, as guaranteed by the Fifth and Sixth Amendments. The motion was denied on November 7, 1975.

Appellant on November 18, 1975, entered a plea of guilty to Count XI of the indictment. All other counts of the indictment were dismissed on December 8, 1975.

II.

*Compliance With Rule 11.*

At the time that O'Donnell entered his guilty plea in the instant case, Rule 11 of the Federal Rules of Criminal Procedure provided that before a district court could accept a plea of guilty, it must determine that the plea is made voluntarily, with an understanding of the nature of the charge and the consequences of the plea. The court must also be satisfied that there is a factual basis for the plea. Rule 11(f).

While Rule 11 does not require that the district court observe any particular ritual, it does require that the judge employ procedures sufficient to determine that the defendant understands the charges against him and the consequences of his plea, and that the defendant's plea is truly voluntary. *Guthrie v. United States*, 517 F.2d 416, 418 (9th Cir. 1975); *United States v. Youpee*, 419 F.2d 1340, 1344 (9th Cir. 1969); *Munich v. United States*, 337 F.2d 356, 359 (9th Cir. 1964).

Rule 11 is also designed to produce a complete record when the plea is entered of the factors relevant to determining whether the Rule has been complied with in order to suppress frivolous attacks on the constitutional validity of the plea. *Santobello v. New*

*York*, 404 U.S. 257, 261 (1971); *McCarthy v. United States*, 394 U.S. 459, 465 (1969); *Guthrie v. United States*, *supra* at 418 (9th Cir. 1975). If the district court fails to comply with Rule 11, the plea entered thereunder must be set aside and the case must be remanded in order to permit the defendant to plead anew. *McCarthy v. United States*, *supra* at 463-64 (1969).

After carefully examining the record, we are satisfied that the requirements of Rule 11 have been met. The record established that appellant was 58 years old, was not under the influence of any drug, medication or alcohol that might impair his reasoning, had a college education, and had been involved in court proceedings prior to the charges involved in the present case. O'Donnell was apprised of the fact that by pleading guilty he waived his constitutional right to a jury trial and the penumbral rights thereof, and he was informed that the maximum possible sentence for Count XI was five years imprisonment and a \$5,000 fine. The court read the substance of Count XI to O'Donnell and then asked: "Generally, are those facts true?" O'Donnell answered, "Yes, they are." He also informed the court that before deciding to plead guilty, he had discussed the charges and facts set forth in Count XI with his attorney. O'Donnell also stated that he was pleading guilty to Count XI because he was guilty of the charges and for no other reason.

From the record it appears that O'Donnell understood the nature of the offense charged in the indictment and that his plea clearly was voluntary. The record also establishes a factual basis for accepting the guilty plea. We therefore reject appellant's contention with respect to Rule 11. See *Guthrie v. United States*, *supra*

at 418-19; *United States v. Youpee*, *supra* at 1343-44. Our decision in *Salas v. United States*, 529 F.2d 1276 (9th Cir. 1975), is not to the contrary.

### III.

#### *Waiver of Pre-Trial Constitutional Violations by Guilty Plea.*

The Sixth Amendment's guarantee of the right to a speedy trial is activated only when the putative defendant in some manner becomes an "accused." *United States v. Marion*, 404 U.S. 307, 313 (1971). Dismissal of the conviction and indictment, moreover, is the only proper remedy for deprivation of one's right to a speedy trial. *Strunk v. United States*, 412 U.S. 434, 440 (1973). The Fifth Amendment, on the other hand, requires only that an indictment be dismissed if it is shown that the preaccusation delay substantially prejudiced the defendant's right to receive a fair trial. 404 U.S. at 326. Appellant became an accused when he was indicted by the grand jury.

The Supreme Court of the United States has never explicitly considered whether a guilty plea waives these specific rights, but recent court opinions do provide guidelines. The guilty plea trilogy of *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina*, 397 U.S. 790 (1970), stand for the general rule that a guilty plea that is intelligently and voluntarily made, precludes later constitutional challenges to the pretrial proceedings. *Lefkowitz v. Newsome*, 95 S.Ct. 886, 889 (1975).

The principle of the *Brady* trilogy was reaffirmed in *Tollett v. Henderson*, 411 U.S. 258 (1973). Speaking for the Court, Mr. Justice Rehnquist stated:

We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*. *Id.* at 267.

*Menna v. New York*, 96 S.Ct. 241 (1975) is the latest decision of the Court in this area. *Menna* held that a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment are not waived by a plea of guilty to a charge with respect to which the Constitution precludes the State from prosecuting. *Id.* at 242, n.2. The court explained that neither *Tollett* nor the *Brady* trilogy hold that counseled pleas of guilty inevitably waive all antecedent constitutional violations. Instead, these cases stand for the proposition that pleas of guilty, when made voluntarily and intelligently, are admissions of factual guilt which are so reliable, that the issue of factual guilt is removed from the case. "A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Id.*

The appellant in the instant case argues that the rights guaranteed by the Due Process Clause of the

Fifth Amendment and by the right to a speedy trial of the Sixth Amendment are analogous to the rights protected by the Double Jeopardy Clause of the Fifth Amendment. He therefore contends that his guilty plea did not waive these violations. We disagree.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the court observed that the Double Jeopardy Clause provides three related protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *Id.* at 717.

The underlying premise of these protections is that "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 95 S.Ct. 1013, 1021-22 (1975). [Citations omitted]. Thus the very initiation of the proceedings in *Menna* operated to deny the defendant his right against double jeopardy. The Constitution protects him from a second conviction whether its origin is a trial or a plea of guilty.

The protections afforded by the Fifth and Sixth Amendments are different. Their purpose is to insure that factual guilt is validly established. That is, their purpose is to guarantee that the accused's right to a fair trial is not substantially prejudiced by either pro- or post-accusation delays. The existence of such violations is consistent with guilt as a matter of fact.

If guilt can be validly established such violations are not logically inconsistent therewith. While such violations preclude the establishment of guilt by trial, that is the extent of their reach. The establishment of guilt by a proper plea is not condemned by these protections. The Constitution protects the accused from conviction by trial but not a conviction by way of a plea of guilty. *Tollett* and the *Brady* trilogy control here. *Menna* is inapplicable.<sup>2</sup> For this reason it is not necessary for us to consider the merits of O'Donnell's constitutional claims.

#### IV.

##### *Failure to State an Offense.*

We have construed 18 U.S.C. § 152 to require that false oath be given in relation to some material matter. *Metheany v. United States*, 365 F.2d 90 (9th Cir. 1966), *appeal after remand*, 390 F.2d 559, *cert. denied*, 393 U.S. 824 (1968).

Count XI of the indictment charged that O'Donnell knowingly and fraudulently made a false oath as to material matters relating to his bankruptcy petition in that he knowingly and fraudulently stated that he was employed by United International Corporation of Phoenix, while in truth and fact he was not employed by United.

O'Donnell's principal argument is that the false statements alleged in Count XI were immaterial, since they *overstated* his current earning capacity. Appellant therefore contends that to constitute material false statements,

the statements would have to *minimize* his earning capacity. We disagree.

Materiality does not require a showing that creditors are harmed by the false statements. *See In Re Robinson*, 506 F.2d 1184, 1188-89 (2d Cir. 1974). Matters are material if pertinent to the extent and nature of bankrupt's assets, including the history of a bankrupt's financial transactions. *See Methane, supra*. Materiality is also established when it is shown that the inquiry bears a relationship to the bankrupt's business transactions or his estate, *Willoughby v. Jamison*, 103 F.2d 821, 824 (8th Cir.), *cert. denied*, 308 U.S. 588 (1939), or concerns the "discovery of assets, including the bankrupt's financial transactions." *In Re Mascolo*, 505 F.2d 274, 277 (1st Cir. 1974). Statements designed to secure adjudication by a particular bankruptcy court are also material. Under these standards O'Donnell's false statements cannot be considered immaterial. They concerned his ability to acquire assets and may have tended to assure the bankruptcy forum he desired. They were material to his creditors, to him, and to the bankruptcy court. This surely is enough.

The judgment of the district court is  
**AFFIRMED.**

<sup>2</sup>Moreover, even if a plea of guilty did not in and of itself waive a speedy trial defense, the defendant here specifically was asked to and did waive "any defenses" that he might have to the charge in question. No such specific waiver was present in *Menna*.

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No. 76-234

MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States  
OCTOBER TERM, 1976

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BOYD JAMES O'DONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-234

BOYD JAMES O'DONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A) is reported at 539 F. 2d 1233.

**JURISDICTION**

The judgment of the court of appeals was entered on July 20, 1976. The petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the inquiry conducted by the district court before accepting petitioner's plea of guilty satisfied the requirements of Rule 11, Fed. R. Crim. P.
2. Whether the court of appeals erred in concluding that petitioner's plea of guilty precluded review of the

denial of his motion to dismiss the indictment for pre-indictment delay and lack of a speedy trial.

#### STATEMENT

An indictment filed on January 9, 1975, in the United States District Court for the District of Arizona charged petitioner with 31 counts of making a false oath in relation to bankruptcy proceedings, in violation of 18 U.S.C. 152. On November 18, 1975, following an unsuccessful motion to dismiss the indictment for denial of his right to a speedy trial and for pre-indictment delay, petitioner requested permission to withdraw his plea of not guilty and to enter a guilty plea to one count of the indictment (Count XI).

Before accepting the plea, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. At the outset petitioner expressed his awareness of the maximum punishment upon conviction (Tr. 19-20). Government counsel then disclosed to the court the terms of a plea bargain, providing for dismissal of the remaining counts at sentencing, dismissal of related charges filed against petitioner's wife, and no recommendation by the government with regard to the sentence to be imposed (Tr. 20). Petitioner told the court that he understood and agreed with the terms of the bargain as related by the Assistant United States Attorney (Tr. 20-21) and that he and his counsel had discussed and investigated the matter thoroughly, with full awareness of the facts of the case (Tr. 21-22). Petitioner's attorney stated that he concurred in the decision to enter a plea of guilty (Tr. 22).

Petitioner informed the court that he was 58 years old, had a college education, had prior courtroom experience, and understood the nature of the proceedings (Tr. 22-23). The court advised petitioner that by pleading guilty

he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses, and the privilege against self-incrimination. Petitioner replied that he understood these consequences but that he nonetheless desired to plead guilty because he was guilty of the offense charged (Tr. 23-24).

The court then read Count XI, which in essence charged that on March 13, 1970, petitioner had knowingly and fraudulently made a false oath as to material matters in relation to his own bankruptcy proceeding, by filing with the clerk of the district court a bankruptcy petition containing a false representation that petitioner was employed as a salesman for the United International Corporation. The following colloquy ensued between the court and petitioner (Tr. 25-26):

[Q.] Generally, are those facts true?

A. Yes, they are.

Q. Did you file the particular petition involved here?

A. Yes, I did.

Q. And did you state therein that you were employed as a salesman for United International?

A. Yes, I did.

Q. And was that true or false?

A. That was false.

In light of these responses, the court agreed to accept the plea of guilty. On December 8, 1975, petitioner was sentenced to three years' imprisonment and the remaining charges against him and his wife were dismissed. The court of appeals affirmed (Pet. App. A).

rejecting petitioner's attack upon the adequacy of the Rule 11 proceedings and his attempt to relitigate his speedy trial and pre-indictment delay claims.

#### ARGUMENT

1. Petitioner contends (Pet. 9-12) that the district court's inquiry failed to satisfy the requirements of Rule 11, Fed. R. Crim. P., because the court failed to set forth the elements of the offense, to place petitioner under oath during the proceedings, or to make an adequate determination that a factual basis existed for the plea. In addition, petitioner alleges that the court erred in allowing government counsel to recite the maximum penalty for the offense and to ask petitioner whether he understood the extent of the penalty. The court of appeals correctly rejected these claims, however, for the record shows that petitioner entered his plea of guilty voluntarily, with a full understanding of the charges against him and of the consequences of his plea, and that there was a factual basis for the plea. In any event, petitioner's contentions concern the proper interpretation of a version of Rule 11 that has since been repealed and, accordingly, they do not warrant further review.<sup>1</sup>

At the time of petitioner's guilty plea, Rule 11 provided that the court "shall not accept such plea \*\*\* without first addressing the defendant personally and determining

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<sup>1</sup>Effective December 1, 1975, Rule 11 has been amended to require the court to address the defendant personally with regard to the maximum possible penalty provided by law (Rule 11(c)(1)). In addition, Rule 11(c)(5) states that a defendant must be warned that the answers he gives to the court's questions about the offense, if under oath, may subject him to a prosecution for perjury or false statement. As petitioner recognizes (Pet. 11), these amendments were not in effect on the date of his plea.

that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. \*\*\* The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." The record reflects that there was adequate compliance with those requirements in this case. Petitioner, who was represented by counsel, was questioned at length by the court, and his unequivocal responses leave no doubt that his guilty plea was knowingly and voluntarily entered. Although, as petitioner contends, the court's thorough inquiry was preceded by government counsel's statement of the maximum penalty for the offense and by petitioner's express admission that he was aware of that penalty, nothing in Rule 11 as it read prior to the recent amendments prohibited such preliminary questioning by the prosecutor or others. See *United States v. Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Limon-Gonzalez v. United States*, 499 F. 2d 936, 937, n. 2 (C.A. 5); *Davis v. United States*, 470 F. 2d 1128, 1130-1132 (C.A. 3); *United States v. Mileto*, 434 F. 2d 251, 252 (C.A. 2). Rule 11 is designed to create a record to demonstrate the voluntariness of a plea of guilty (*McCarthy v. United States*, 394 U.S. 459, 467), and therefore the essential concern is not that the court ask all of the questions but that "the record leave no doubt that the defendant heard and understood what was said." *United States v. Yazbeck*, *supra*, 524 F. 2d at 643. In any event, the district court specifically asked petitioner whether he "underst[ood] the penalties that the Court could impose, as just explained to you by [the

Assistant United States Attorney]," and petitioner said "Yes, I do" (Tr. 24).<sup>2</sup>

Furthermore, contrary to petitioner's contentions (Pet. 10), there was no requirement under the old Rule 11 that a defendant be questioned under oath.<sup>3</sup> Finally, petitioner's responses clearly established that there was a factual basis for his plea, since he admitted to each of the allegations in the indictment, including the charge that he "knowingly and fraudulently" made a false material representation during the bankruptcy proceeding concerning his employment. It is sufficient under Rule 11 if "the inquiry made \* \* \* was factually precise enough and sufficiently specific to develop that [petitioner's] conduct on the [occasion] involved was within the ambit of that defined as criminal." *Jimenez v. United States*,

<sup>2</sup>By contrast, in *United States v. Crook*, 526 F. 2d 708 (C.A. 5), the court questioned the defendant only as to his participation in the offense, while permitting government counsel to inquire broadly of the defendant whether the plea of guilty was voluntary. While we disagree with the result in *Crook*, which seems unnecessarily technical, that case is therefore clearly distinguishable. Similarly, in *United States v. Yazbeck*, *supra*, the court recognized that the trial judge may rely on others to state the statutory punishment or to conduct portions of the required examination, but reversed the conviction because the record was not clear as to whether the defendant had heard and understood government counsel's statement of the maximum penalty.

<sup>3</sup>Exercising its supervisory authority, one circuit has ordered that a defendant wishing to enter a guilty plea be questioned under oath, in order to preclude later attacks on the representations made during the Rule 11 inquiry. *Bryan v. United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079. That court has held, however, that the failure to place the defendant under oath does not entitle him to vacate his plea of guilty absent a showing of prejudice. *United States v. Maggio*, 514 F. 2d 80, 91-92 (C.A. 5), certiorari denied, 423 U.S. 1032.

487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See *Bachner v. United States*, 517 F. 2d 589, 593 (C.A. 7).

2. Petitioner contends (Pet. 6-9) that the court of appeals erred in concluding that his guilty plea precluded review of the claim that he was prejudiced by pre-indictment delay and by denial of a speedy trial. But it has long been held that a plea of guilty waives such defects. See *Speed v. United States*, 518 F. 2d 75 (C.A. 8), certiorari denied *sub nom. Camp v. United States*, 423 U.S. 988; *United States v. Lee*, 500 F. 2d 586 (C.A. 8), certiorari denied, 419 U.S. 1003; *Karcher v. Wainwright*, 476 F. 2d 179 (C.A. 5); *United States v. Mann*, 451 F. 2d 346 (C.A. 2); *Fowler v. United States*, 391 F. 2d 276 (C.A. 5); *United States v. Doyle*, 348 F. 2d 715 (C.A. 2), certiorari denied, 382 U.S. 843.

*Menna v. New York*, 423 U.S. 61, does not require a different result. In *Menna*, the Court held that a plea of guilty did not prevent appellate consideration of defendant's claim that his prosecution was barred by double jeopardy, noting (*id.* at 63, n. 2):

A guilty plea \* \* \* simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

Unlike the Double Jeopardy Clause, whose protections are "distinctive," *Blackledge v. Perry*, 417 U.S. 21, 31, the right to be indicted and tried expeditiously is designed in large part to limit the possibility that a defendant's defense will be impaired through loss of memories or the death or disappearance of witnesses.

*Barker v. Wingo*, 407 U.S. 514, 532; *United States v. Marion*, 404 U.S. 307, 324. By freely and voluntarily pleading guilty, however, petitioner had admitted the truth of the charges in the indictment, has ensured that his factual guilt was properly established, and has conceded that his conviction was not unfairly procured by the passage of time. Thus, as the court of appeals correctly held (Pet. App. 7-8), petitioner's Fifth and Sixth Amendment claims are not logically inconsistent with the valid establishment of guilt. Hence, they were waived by his plea of guilty.<sup>4</sup>

Other reasons also suggest that petitioner's arguments have little to recommend them. As noted above, proof of prejudice is an essential ingredient of a successful claim of pre-indictment or pretrial delay, and such proof is generally unavailable before the trial itself. See *Barker v. Wingo*, *supra*, 407 U.S. at 530-532. Since petitioner's voluntary plea of guilty eliminated a trial,

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<sup>4</sup>Petitioner could have foregone a full-dress trial yet preserved his pre-indictment delay and speedy trial claims for appeal either by stipulating to the essential facts (see *United States v. Mendoza*, 491 F. 2d 534, 537-538 (C.A. 5)), or by attempting to enter a plea of guilty with a reservation, a procedure that has been approved by some courts of appeals when consented to by the government and the trial judge. See *United States v. Brown*, 499 F. 2d 829, 831-832 (C.A. 7), certiorari denied, 419 U.S. 1047; *United States v. Rothberg*, 480 F. 2d 534, 535 (C.A. 2), certiorari denied, 414 U.S. 856. Under the circumstances here, however, it would be inequitable to allow petitioner to raise his substantive legal claims on appeal after pleading guilty pursuant to a plea bargain that led to the dismissal of 30 of the 31 counts against him, since the government agreed to the plea in the belief that it would terminate the proceedings against petitioner. Moreover, the fact that petitioner did not seek to preserve his appeal rights at the time of entry of his plea strongly suggests that his appeal is a product of dissatisfaction with his sentence.

it thus prevented the compilation of an adequate evidentiary record for an appellate court to consider in reviewing his claims. Therefore, just as a defendant who fails to present these Fifth and Sixth Amendment arguments prior to trial may not raise them on appeal (see Fed. R. Crim. P. 12(b); *Fleming v. United States*, 378 F. 2d 502, 504 (C.A. 1); cf. *Davis v. United States*, 411 U.S. 233), petitioner's guilty plea effectively precluded further review of the denial of his pretrial motions and constituted a waiver of those claims. See *Tollett v. Henderson*, 411 U.S. 258, 267.<sup>5</sup>

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<sup>5</sup>In any event, the record clearly shows that the district court properly denied petitioner's motions to dismiss. This prosecution arose out of petitioner's bankruptcy proceedings, which were still pending on appeal on the eve of trial. The Federal Bureau of Investigation began its extensive investigation of this case in 1971, and during the next three years it submitted over 300 pages of reports to the United States Attorney, who also had to examine more than 2,000 pages of transcripts and nearly 200 exhibits. See Tr. 4-5. An indictment was filed on May 30, 1974, and a superseding indictment was filed on January 9, 1975. On January 30, 1975, a trial date in November 1975 was scheduled. However, not until late October 1975, three weeks before trial, did petitioner file a motion to dismiss the indictment on speedy trial grounds. Furthermore, his claim of prejudice concerned the death or incapacitation of witnesses who were not mentioned and had not testified in the first round of bankruptcy proceedings and who certainly were irrelevant to the count on which petitioner pleaded guilty. Moreover, petitioner did not allege, much less prove, that the delays were attributable to a decision by the government to prejudice his defense. In these circumstances, the district court, following a hearing, properly denied petitioner's speedy trial and pre-indictment delay claims.

**CONCLUSION**

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1976.